File No. CT 2005-006

COMPETITION TRIBUNAL

IN THE MATTER OF the *Competition Act*, R.S.C. 1985, c. C-34, as amended;

IN THE MATTER OF an application by B-Filer Inc, B. Filer Inc. doing business as GPAY GuaranteedPayment and NPay Inc. for an order pursuant to section 103.1 granting leave to make application under sections 75 and 77 of the *Competition Act*;

AND IN THE MATTER OF an application by B-Filer Inc., B-Filer Inc. doing business as GPAY GuaranteedPayment and NPay Inc. for an interim order pursuant to section 104 of the **Competition Act**.

BETWEEN:

B-FILER INC., B-FILER INC. doing business as GPAY GUARANTEED PAYMENT and NPAY INC.

Applicants

-and-

THE BANK OF NOVA SCOTIA

Respondent

MEMORANDUM OF FACT AND LAW OF THE BANK OF NOVA SCOTIA

Motion to Amend Notice of Application
returnable April 27, 2006

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PART I—OVERVIEW

1. The Respondent, The Bank of Nova Scotia ("Scotiabank") opposes the Applicants' motion to amend their Notice of Application and Statement of Grounds and Material Facts (collectively referred to as the "Notice of Application"). The amendments proposed by the Applicants go well beyond mere housekeeping matters. They instead strike at the heart of the issues that were before the Competition Tribunal on the Leave Application.

2. The Tribunal granted Leave under Section 103.1(7) of the *Competition Act* on the basis of definitions of "product" and "market" put forward by the Applicants and adopted by the Tribunal in its Reasons. The Applicants now seek to amend the Notice of Application and to proceed under Section 75 on the basis of entirely different definitions of "product" and "market" for which leave has not been granted.

PART II—FACTS

(a) Procedural History

3. By Order dated November 4, 2005, the Competition Tribunal granted leave to the Applicants (collectively referred to herein as "GPay") to bring an Application under Section 75 of the *Competition Act*.[1]

4. The Competition Tribunal released Reasons for the Order granting leave to apply under Section 75 of the *Competition Act* on November 14, 2005.[2]

5. Pursuant to Section 111 of the Amended *Practice Direction For The Competition Tribunal* dated January 10, 2005 (the "*Practice Direction*"), where leave is granted under Section 103.1(7) of the *Competition Act*, a Notice of Application filed with the Leave Application under Section 105 of the *Practice Direction* shall be deemed to have been filed on the date upon which leave was granted, for the purpose only of calculating the time limit. As a result, because leave was granted by Order dated November 4, 2005, GPay's Notice of Application is deemed to have been filed on November 4, 2005.[3]

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[1] Affidavit of Patti Ground, Motion Record, Tab 1, para. 2
[2] Affidavit of Patti Ground, Motion Record, Tab 1, para. 3
[3] Affidavit of Patti Ground, Motion Record, Tab 1, para. 4

6. Pursuant to Section 112(1) of the *Practice Direction*:[4]

> *"The applicant shall, within 5 days after a notice of application is filed, serve the notice on each person against whom an order is sought and on the Commissioner who may intervene pursuant to Section 103.2 of the Act."*

7. Pursuant to Section 112(2) of the *Practice Direction*, within 5 days of the service of the Notice of the Application, the Applicant shall file proof of service.[5]

8. GPay has never served its Notice of Application in accordance with Section 112 of the *Practice Direction*. Nor did it ever file proof of service within 5 days thereafter.[6]

9. Because the Applicants never served their Notice of Application, nor filed proof of service, as required by Section 112 of the *Practice Direction*, Scotiabank was never required to serve a Response pursuant to Section 113 of the *Practice Direction*.[7]

10. Shortly after Mr. Osborne assumed carriage of this matter on behalf of the Applicants, he advised Scotiabank's counsel that he proposed to deliver an Amended Notice of Application. Scotiabank's counsel raised with Mr. Osborne the issue of filing a Response. Mr. Osborne advised Scotiabank's counsel that a Response was unnecessary until after he had provided the Applicants' proposed amended materials and counsel for Scotiabank had an opportunity to consider its position with respect thereto.[8]

11. As a result of:

(a) the fact that the Applicant did not serve their Notice of Application in accordance with Section 112, and

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[4] Affidavit of Patti Ground, Motion Record, Tab 1, para. 5
[5] Affidavit of Patti Ground, Motion Record, Tab 1, para. 6
[6] Affidavit of Patti Ground, Motion Record, Tab 1, para. 8
[7] Affidavit of Patti Ground, Motion Record, Tab 1, para. 9
[8] Affidavit of Patti Ground, Motion Record, Tab 1, para. 10

(b) Mr. Osborne's statement that it was not necessary for Scotiabank's counsel to prepare a Response until he had delivered his proposed amendment,

no Response was filed on behalf of Scotiabank, nor was one required.[9]

12. It is submitted that the Applicants can have no recourse to Rule 200 of the *Federal Court Rules*. They are not entitled to amend their Notice of Application "as of right", in circumstances where they have failed to comply with the *Practice Direction*. Further, where they have specifically advised counsel for Scotiabank not to file a Response because they proposed to deliver an amended Notice of Application, they are estopped from seeking to rely on the "as of right" provisions of Rule 200.[10]

(b) The Order Granting Leave is Under Appeal

13. The Competition Tribunal's Order granting leave to the Applicants to apply under Section 75 of the *Competition Act* is under appeal to the Federal Court of Appeal. Scotiabank has filed a motion to have the appeal heard before the end of June, 2006, on an expedited basis. The Applicants have consented to Scotiabank's motion to obtain an expedited hearing date.[11]

14. The Federal Court of Appeal does have the time available to hear the appeal in this matter before the Court breaks for its summer recess. The Court has provided dates acceptable to all counsel for the Appeal to be heard in June 2006.[12]

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[9] Affidavit of Patti Ground, Motion Record, Tab 1, para. 12
[10] The principles of promissory estoppel are well settled. See *Maracle v. Travellers Indemnity Co. of Canada,* [1991] 2 S.C.R. 50.
[11] Affidavit of Patti Ground, Motion Record, Tab 1, para. 13
[12] Affidavit of Patti Ground, Motion Record, Tab 1, para. 14

(c) The Amendments Go to the Heart of Issues in Dispute

15. The proposed changes to the Notice of Application go beyond simple housekeeping matters. The Applicants seek to fundamentally re-cast the case upon which leave was granted. In particular, the Applicants seek to alter the definition of "product" and of "market" after leave has been granted, and without any evidence to support those changes.[13]

16. The proposed changes pervade the entire proposed Amended Notice of Application. They cannot be parsed in a manner which would permit the Applicants to proceed with non-controversial amendments.[14]

PART III—SUBMISSIONS AND LAW

(a) Introduction

17. This motion is without precedent. There is no decision of the Competition Tribunal in which the Applicants sought leave to amend the Notice of Application after leave to apply had been granted under s. 103.1(7) of the *Competition Act*.

18. The case of *Canada (Commissioner of Competition) v. Sears Canada Inc.*[15] (relied on by the Applicants) is not germane to the motion presently before the Tribunal. There, the Respondent sought to amend its Response by delivering a "condensed" version of its original Response. There was no issue with respect to the Applicant fundamentally changing the nature of the case upon which leave had previously been granted. Nevertheless, because, *inter alia*, of the breadth of the changes sought, the Competition Tribunal refused to grant leave to the Respondent to amend its Response.

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[13] Proposed Amended Notice of Application and Statement of Grounds and Fact, Applicants' Motion Record, Tab 2
[14] Proposed Amended Notice of Application and Statement of Grounds and Fact, Applicants' Motion Record, Tab 2
[15] (2003), 28 C.P.R. (4th) 395 (Comp. Trib.) aff'd [2004] F.C.J. No. 1452 (C.A.)

19. Although there is no precedent in the Competition Tribunal for amendments sought after leave has been granted, cases decided in analogous circumstances are apposite.

(b) Amendments Should Not be Permitted After Leave Has Been Granted

20. Amendments that change the nature of a proceeding upon which leave was previously granted will not be permitted. This issue has been considered in a number of contexts. The principle has been affirmed repeatedly.

21. In *Maxwell v. MLG Ventures Ltd.*, [16] the plaintiff sought to amend its statement of claim after the action had been certified as a class proceeding. The Court refused to allow the plaintiff to amend the pleading after certification as a class proceeding had been granted:

> *In my view, to permit the amendments sought in the proposed new paragraph 14 would fundamentally change the nature of the action and would require reconsideration of all the matters considered on the first application. I think it not appropriate to have an action certified as a class proceeding and then, by motion to amend the statement of claim, reconstitute the action by adding serious new allegations which fundamentally change the nature of the action to one quite different from the action originally certified. I am accordingly not prepared to grant leave to permit the amendments contained in the proposed new paragraph 14 of the statement of claim, ...because such amendments, in my view, fundamentally change the nature of the action originally certified and would require reconsideration by the court of all the issues examined on the original application to certify the action.* (emphasis added)

22. Similarly, in *Comite d'Environnement de la Baie Inc. v. Societe d'Electrolyse et de Chimie Alcan Ltee*, [17] the Quebec Court of Appeal rejected an attempt by a representative plaintiff to augment its claims after the Court authorized the proceeding as a class action. The

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[16] (1995), 40 C.P.C. (3d) 304 at para. 20 (Ont. Gen. Div.); See also *Endean v. Canadian Red Cross Society*, [1998] B.C.J. No. 1542 (S.C.). In that case, the plaintiff sought to amend its statement of claim after the matter had been certified as a class proceeding. The Court dismissed the motion to amend and stated that such changes would have to pass scrutiny under the Class Proceedings Act, which sets out the criteria for certification, before they could be certified for a class-proceeding.

[17] (1992), 95 D.L.R. (4th) 644 at 648 and 651-652 (Que. C.A.)

defendant argued that the claim could not be amended "without going back to square one of the process authorizing the class action". The Court of Appeal accepted this argument, and held that the defendants were entitled to the opportunity to contest the proposed amendments based on the certification criteria.

23. Courts have also considered requests to amend pleadings after leave has been granted to bring a derivative action within the context of business corporations legislation.

24. In *Ebco Industries Ltd. v. Eppich*, [18] the plaintiff sought to amend its statement of claim after the Court had granted leave to bring the derivative action. The Court held:

> *Without further application of the kind contemplated by s. 201 of the Act* [i.e. an application for leave to bring a derivative action] *the proceeding which has been commenced by writ must be restricted to the causes of action as it was framed from the outset.*

Accordingly, the new claim for which leave had not initially been granted was struck by the Court.

25. The same result obtained in *Northwest Sports Enterprises Ltd. v. Griffiths*. [19] There, the Applicant had been granted leave to bring a derivative action, and afterwards sought leave to amend the Statement of Claim. The court noted that the proposed changes were "fundamental". Accordingly, the court concluded that a fresh application for leave to bring a derivative action was required, so that the court could consider the statutory factors afresh.

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[18] [2000] B.C.J. No. 1437 at para. 27 (S.C.);
[19] [1999] B.C.J. No. 3150 (S.C.).

26. Courts have also refused to grant amendments after leave has been granted to serve a statement of claim *ex juris*. [20] In those cases, courts have held that the new claims may not be able to satisfy the test for service *ex juris*.

(c) The Same Principle Applies in the Supreme Court of Canada

27. This fundamental principle has been applied on a consistent basis even at the level of the Supreme Court of Canada. Indeed, the Supreme Court treats the issue as a matter of jurisdiction.

28. For example, in *Chan v. Canada (Minister of Employment and Immigration)*, Major J. stated:

> "*It is not open to this Court to decide the Appellant's case on the basis of an issue on which leave to appeal was not granted.*"[21]

29. Likewise, in *R. v. Wigman*, the Court stated:

> "*In such cases, the Supreme Court is without jurisdiction to hear arguments dealing with issues other than the ones enumerated on the order granting leave to appeal.*"[22]

(d) The Amendment is Sought After an Appeal Has Been Commenced

30. The Competition Tribunal released its Order granting leave pursuant to Section 103.1 of the *Competition Act* on November 4, 2005. On November 14, 2005, a Notice of Appeal to the Federal Court of Appeal was delivered. The Applicants have consented to the Respondent's request for an expedited hearing of the Appeal. The Appeal will likely be argued in June, 2006.

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[20] See for example *Hitchin v. Hitchin*, [1946] O.W.N. 913; and *Empire-Universal Films Ltd. v. Rank*, [1938] O.W.N. 704

[21] [1995] 3 S.C.R. 593, at para. 147.

[22] [1987] 1 S.C.R. 246, at p. 258. See also *R. v. Kienapple*, [1975] 1 S.C.R. 729, at p. 732.

31. In *Operation Dismantle v. The Queen*, [23], the Supreme Court of Canada (*per* Wilson J.) stated:

> *Counsel for the appellants submit that prior to the filing of a statement of defence they were entitled to amend as of right under Rule 421* [the predecessor to Rule 200] *and that they should not be prejudiced with respect to this right because they invoked the discretion of the Court under Rule 1104. It may, however, be of significance in this connection that their application for amendment to the statement of claim was filed after the Crown had instituted its appeal to the Federal Court of Appeal. In my view, their application was therefore one made "during the pendency of an appeal" to which the Rules of the Federal Court of Appeal would apply. This means, in my view, that the appellants' right under Rule 421 had expired and their only recourse was to proceed under Rule 1104.*

32. It is submitted that any right the Applicants may have had to amend without leave expired upon delivery of the Notice of Appeal on November 14, 2005.

(e) Conclusion

33. The Applicants did not comply with the *Practice Direction.* They failed to serve their Notice of Application within five days of Leave having been granted. As a result, there was never an obligation on the part of Scotiabank to deliver a Response.

34. The *Practice Direction* only contemplates that the Notice of Application to be served and filed following the granting of Leave will be that which was filed as part of the Application for Leave. An amendment thereto is not contemplated by the *Practice Direction.* The Notice of Application must comply with the Leave which was granted. Otherwise, the Applicants must make a fresh application for Leave.

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[23] [1985] 1 S.C.R. 441 at 492. See also *Milliken & Co. v. Interface Flooring Systems (Canada) Inc.* (1993), 53 C.P.R. (3d) 71 (Fed.T.D.) at p. 75, in which the Court affirmed that when amendments sought to be made pertain to matters under consideration in the Appeal, the amendments should not be made without leave.

35. In any event, any right to amend the Notice of Application which the Applicants might have otherwise had (had they complied with the *Practice Direction*) expired by reason of the Appeal launched on November 14, 2005. As such, the Applicants must be granted leave of the Competition Tribunal to amend the Notice of Application.

36. The changes proposed by the Applicants go to the core of the issues that were before the Tribunal on the Leave Application, including the definition of "market" and the definition of "product". The Applicants' proposed changes in this regard pervade the entirety of the proposed Amended Notice of Application. Moreover, most of the proposed changes to the Notice of Application are put forth without any evidence to support them.

37. The Applicants should not be permitted to amend their Notice of Application in the absence of a full consideration of a fresh Leave Application under Section 103.1. The Respondent is entitled to review the evidence in support of the case that it must meet on a Leave Application and to respond to it. The Tribunal must subject the evidence to the test articulated under Section 103.1 of the *Competition Act*.

PART IV—ORDER SOUGHT

38. That the Applicants' Motion to amend the Notice of Application and Statement of Grounds and Material Facts be dismissed, with costs payable to the Respondent.

ALL OF WHICH IS RESPECTFULLY SUBMITTED.

F. Paul Morrison

Lisa M. Constantine

Glen G. MacArthur
of counsel for The Bank of Nova Scotia

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B E T W E E N :

B-FILER INC. Applicants	- and -	THE BANK OF NOVA SCOTIA Appellant (Respondent)	File No. CT 2005-006

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